79-446

No. _____

In The Supreme Court Of The United States

RUTH MINERVA KINSEY, as Executrix and Surviving Heir of Johnnie Richard Longenecker, Deceased,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review judgment entered June 20, 1979 by the United States Court of Appeals for the Tenth Circuit in *Ruth Minerva Kinsey, as Executrix and Surviving Heir of Johnnie Richard Longenecker, Deceased, v. United States of America*, No. 78-1293.

OPINIONS

The opinion of the Court of Appeals is a *per currium* opinion and was docketed on June 20, 1979, and, to date,

is not reported. Appendix A to this petition is a copy. The district court's opinion and order was filed on February 6, 1978. Appendix B to the petition is a copy.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254. The Court of Appeals rendered its decision on June 20, 1979. The Court of Appeals had jurisdiction under 28 U.S.C. §1291, 1292 and 1294 of the Appeals from the District Court for the Eastern District of Oklahoma. The district court had jurisdiction of the complaint under the Federal Tort Claims Act (28 U.S.C. §1346(b), 1346(c), 2401(b), 2402, 2671, 2672, 2674-2680).

QUESTIONS PRESENTED: ISSUES

The judicially created *Feres* doctrine (*Feres v. United States,* 340 U.S. 135 (1950)) unjustly deprives military personnel of the right to sue under the Federal Tort Claims Act for damages from negligence in non-combative non-wartime situations. The *Feres* doctrine holds that where an injury arises out of or incident to any military service whatsoever — combative or non-combative — a special relationship exists justifying the inequitable deprivation of remedy by suit. The question for review is whether in light of current abolition of the draft, and with regard to the current contractual relationships between soldier and military for certain non-combative benefits, and with a view toward the inequitable result of deprivation of remedy, this Court ought restrict the *Feres* doctrine to

allow maintenance of a suit arising out of non-combative situations, rather than wiping out a serviceman's right to sue in all actions arising out of or incident to military service whatsoever.

If we are to have to have a successful voluntary military, should not its members have equal rights and remedies as to non-combative and non-wartime services and benefits? Are the non-combative and non-wartime government benefits provided for soldiers to be of a lower standard than for the rest of society? Are members of the military less entitled than other citizens to bring a suit for improper delivery of non-combative government benefits? What is the relationship of a volunteer to his armed service as opposed to a member conscripted by compulsion of law? Is our volunteer military at some risk by *Feres* depriving servicemen of legal remedies that other citizens have in similar non-combative, non-wartime situations?

STATUTES INVOLVED

28 U.S.C. §1346(b), 1346(c), 2401(b), 2402, 2671, 2672, 2674-2680.

28 U.S.C. §2680(j) states an exception to the Tort Claims Act only as follows:

> "Any claim arising out of the *contractual* activities of the military or naval forces or the Coast Guard, *during time of war.*" (Emphasis added).

Feres v. United States, 340 U.S. 135 (1950).

STATEMENT OF CASE

Decedent herein was initially drafted into the Marine Corps on November 23, 1969 but, thereafter, enlisted by signing a contract with the Marine Corps. One of the contractual provisions and benefits was the availability of quality medical care and treatment to be provided by the military. The injury received and complained of, esophageal cancer, which metastasized because of failure to timely diagnose, did not arise out of or in the course of activity incident to military or combatant service. The decedent did not contract the disease because of his military service; the military simply failed to discharge its contractual liability properly toward the decedent herein.

The strictly judicial (non-legislative) doctrine of *Feres v. United States,* 340 U.S. 135 (1950) unjustly applies to preclude the maintenance of this action. The *Feres* doctrine holds that where an injury arises out of or in the course of any military duty, a special relationship exists which precludes the bringing of a claim under the Federal Tort Claims Act. *Feres* doctrine is a judicial doctrine created by the United States Supreme Court and has been universally up-
the maintenance of this action. The *Feres* doctrine holds that where an injury arises out of or in the course of military duty, a special relationship exists which precludes the bringing of a claim under the Federal Tort Claims Act. *Feres* doctrine is a judicial doctrine created by the United States Supreme Court and generally, has been widely upheld by numerous subsequent decisions. For a thorough

compilation of the decisions, see *Schwager v. United States*, 326 F.Supp. 1081 (Ed. PA 1971) and see also 31 A.L.R. Fed. 146 (1977).

A large body of law has grown up following the judicial exclusion stated in the *Feres* case. A reading of the various cases leads to the conclusion that the test utilized was the status of the injured person to determine whether a claim is barred or allowable under the *Feres* doctrine. See *Herreman v. United States*, 476 F.2d 234 (CA 7, 1973). (A national guard officer was traveling on a guard plane on a space available basis as a non-paying passenger. The plane crashed and he was killed. The Court held that by placing himself on the plane in uniform, he was "in the line of duty" and "on command" so that his death was held to be an "incident to service", although he had no duties aboard the aircraft.)

The purpose of this appeal is to question the propriety and allowability and usefulness of the *Feres* doctrine to the instant case in light of the elimination of the draft and the substitution of a voluntary armed force. Further, the position of the Petitioner herein is that the *Feres* doctrine is an improper abrogation of a legislative act by erroneously enlarging interpretation of 28 U.S.C. §2680(j) which states the exceptions to the Tort Claims Act only as follows:

> "Any claim arising out of the *combatant* activities of the military or naval forces or the Coast Guard, *during time of war.*" (Emphasis Added)

ARGUMENT

The medieval absolutism in the statement, "The King can do no wrong" is the root and basis of the much criticized and inequitable doctrine of governmental immunity. See 120 A.L.R. 1376. We all know that the government and its employees are not infallible.

Under the doctrine of governmental immunity, various branches had been exempt from liability for their torts. The entire burden of damage resulting from the wrongful acts of the government and its employees was imposed upon the single individual who suffered the injury, rather than distributed among the entire community constituting the government where it could be borne without hardship upon any individual.

In 1946, the United States enacted the Federal Tort Claims Act. It is a broad waiver of sovereign immunity. The Act provides a right of action in United States District Courts . . . "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)

Further, the Act states in §2674: "The United States shall be liable respecting the provisions of this Title, relating to Tort Claims, in the same manner and to the extent as a private individual under like circumstances . . ."

The Federal Tort Claims Act is a waiver of sovereign immunity. The only exception in the act that is pertinent to this case is contained is 28 U.S.C. 2680(j) *supra*.

The exception in 2680(j) specifically refers to "combatant" activities and "time of war". Congress was very specific.

Prior to the *Feres case*, supra, the law on this issue was very, very clear. The claims of a Plaintiff which arose out of non-combatant activities or which occurred in a non-combatant area, were not excepted by the provisions of 28 U.S.C. §2680(j). *Cerri v. United States*, 80 F.Supp. 831 (DC CA, 1948). See *Johnson v. United States*, 170 F.2d 767.

The word "combat" connotes physical violence; "combatant" — its derivative connotes something pertaining to actual hostilities and the phrase, "combatant activities," of somewhat wider scope and superimposed upon the purpose of the statute, therefore, includes not only physical violence, but activities necessary to and in direct connection with *actual hostilities*.

Combat activities contemplates actual engagement in the exercise of physical force and actual warfare, to the exclusion of practice or training for combat. It has been held that practice or training activities and injuries arising after cessation of hostilities are not excepted from the Act.

Skeels v. United States, 72 F.Supp. 372 (DC La, 1947); and *Griggs v. United States*, 178 F.2d 1, (CA 10, Colo., 1949). It should be noted that the *Griggs case*, supra was reversed by the *Feres* case.

It should be noted that in one case, even though a service man was injured in actual combat, the negligence of government doctors in treating the soldier in a service hospital, does not fall within Subsection (j). *Hungerford v. United States*, 192 F. Supp. 581 (DC CA, 1961) (Plaintiff was injured in combat in Korea. Claim for misdiagnosis was held not barred by Subsection (j).)

Furthermore, it is held in *Williams v. United States*, 115 F. Supp. 386 afrm'd. 218 F.2d 473 (CA 5) without opinion, that the claim is not to be barred by Subsection (j) despite the semi-war activities existing in the world today in which the United States is a participant.

CONCLUSION

The position of the Petitioner in the instant case, is simply that it is incorrect, unfair and an undue enlargement of the Federal Tort Claims Act, to hold that an injury received by a soldier is *automatically* deemed "incident to service" simply because he is a member of the military. It must be recognized that today the military functions in a proprietary as well as in a governmental function, in a military as well as a nonmilitary life style and, in fact, encourages and entices individuals to enlist in same and undertake a military way of life which is, but for war, comparable to any other American life style.

In the instant case especially, Decedent was at a military base in Yuma, Arizona in the United States, was living at his residence in an offbase apartment and reported to work for an eight hour day much in the same manner as any employee of any American Company would do. It was solely because of his contract with the military, that he availed himself of military medical personnel to treat his condition. The military undertook to treat his condition, but did so negligently. There was no war; there was no combat involved.

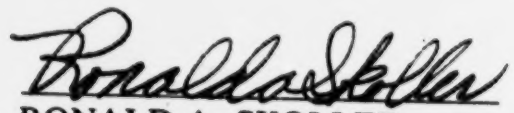
It is true that some argument can be made for the insulation of military personnel in a "command situation" from acts of negligence to maintain necessary discipline in combat situations. But, such a rule is inconsistent with an enlightened and democratic society which maintains and attempts to maintain a *voluntary* military system especially in regard to the area of elective medical treatment. Such a rule is totally incompatible with peace time, state-side activities.

It is time to re-examine the *Feres* doctrine in light of Subsection (j) of the Federal Tort Claims Act and narrow its application to allow the maintenance of the instant action and to compel adherence of quality standards. Medical personnel of the government who undertake elective procedures in noncombat areas and in nonwar zones must be held accountable for injuries and damages they

cause as a result of their negligence in the same manner as private corporations and private individuals.

It is time for an enlightened view of this area.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1293

RUTH MINERVA KINSEY,
as Executrix and Surviving Heir of
Johnnie Richard Longenecker, Deceased,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA (D.C. Case No. 77-360C)

Ronald A. Skoller, Tulsa, Oklahoma, for Plaintiff-Appellant.

Betty Outhier Williams, Assistant United States Attorney (with Julian K. Fite, United States Attorney, on the brief), Muskogee, Oklahoma, for Defendant-Appellee.

Before SETH, Chief Judge, HOLLOWAY and McKAY, Circuit Judges.

PER CURIAM.

Appellant sought recovery under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674-2680 (1976), for the alleged negligence of military personnel in treating her now deceased son while he was in the Marine Corps on active duty. Her complaint was dismissed by the district court. We affirm.

The doctrine of *Feres v. United States*, 340 U.S. 135 (1950), bars the bringing of actions such as the instant one

under the Federal Tort Claims Act. Appellant's sole contention on appeal is that the *Feres* doctrine should be re-examined and repudiated insofar as it applies to a broad range of cases presently governed by the doctrine, including the one before us. We believe appellant raises legitimate arguments concerning the continued soundness of *Feres*. However, appellant has given us no indication that the Supreme Court has shown any inclination to abandon or significantly limit the doctrine;[1] Congress has not accepted Mr. Justice Jackson's invitation[2] to overrule *Feres* if it reflects a misapprehension of Congress' intent in enacting the Federal Tort Claims Act. Under these circumstances, we are bound to follow *Feres*.

We note that in her brief on appeal appellant asserts that her deceased son enlisted in the Marine Corps by execution of a contract, that one of the contractual provisions was access to quality medical care and treatment, that the military failed properly to discharge this contractual obligation to decedent, and that it was solely because of his contract with the military that he availed himself of military medical personnel to treat his condition. These assertions do not appear on the face of appellant's complaint. Even if they did, the court below would have lacked jurisdiction to consider the claim. The district courts have jurisdiction over claims against the United States "founded

[1]Indeed, only two terms ago the Supreme Court endorsed *Feres* and, far from limiting its applicability, extended it. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977).

[2]*See* 340 U.S. at 138.

. . . upon any express or implied contract with the United States" only when such claims do not exceed $10,000. 28 U.S.C. § 1346(a)(2) (1976). The claim in this case is greatly in excess of that amount. Our disposition is of course without prejudice to consideration of any contractual claim appellant may have in an appropriate proceeding. *See* 28 U.S.C. § 1491 (1976).

The order below is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 77-360-C

RUTH MINERVA KINSEY,
as Executrix and Surviving Heir of
Johnnie Richard Longenecker, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER OF DISMISSAL

This is a medical malpractice action brought against the United States pursuant to the Federal Tort Claims Act (Act), 28 U.S.C. §§1346(b), 2671 et seq. Pursuant to Rule 12(b), Federal Rules of Civil Procedure, the United States has filed a Motion to Dismiss Plaintiff's Complaint on the grounds that the Court lacks jurisdiction over the subject matter and that the Complaint fails to state a cause of action against the United States.

Johnnie Richard Longenecker (Longenecker) was inducted into the United States Marine Corps in 1969. In June, 1974 he sought medical treatment from Marine Corps medical personnel for severe intestinal indigestive problems; sometime after July, 1975 it was determined that he was suffering from cancer of the esophagus. He was retired from active military service in October, 1975 by reason by permanent physical disability and received medical treatment until his death in 1976. Plaintiff, the

executrix of Longenecker's estate, brings the instant action against the United States seeking compensatory and punitive damages for the negligent failure of Marine Corps medical personnel to properly diagnose and treat Longenecker's cancerous condition while he was on active duty with the Marine Corps.

In its Motion to Dismiss, the United States contends that under the doctrine announced by the Supreme Court in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 P.Ed. 152 (1950), the United States is not liable under the Federal Tort Claims Act for injuries to a serviceman where the injuries arose out of or are in the course of activity incident to service. The United States asserts that as Longenecker was on active duty at the time he was treated at a military hospital, this action comes within the scope of the *Feres* doctrine and this Court is precluded from having jurisdiction of the subject matter of the action.

In her Opposition Brief to Defendant's Motion to Dismiss, the Plaintiff maintains that the *Feres* doctrine is not applicable to this case. She argues that the injury involved herein, Longenecker's esophogeal cancer, did not arise out of or in the course of activity incident to military service. She cites *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), as allowing a lawsuit against the United States under the Act where the injury sustained had nothing whatever to do with the injured party's military status.

The Court finds that the *Feres* doctrine is applicable to this case and precludes this Court from having jurisdiction of Plaintiff's action. Two of the three cases which were before the Supreme Court in *Feres* were medical malpractice cases, and one of these was also a wrongful death action. As in the case at bar, the victims of the alleged malpractice in *Feres* were soldiers on active duty. Thus this case appears to be indistinguishable from *Feres*. After considering the unique relationship of military personnel to their government and the fact that Congress had provided a uniform system of compensation for the injury or death of those in the armed forces, the Court in *Feres* held that the United States is not liable for injuries to servicemen which are sustained while on active duty as a result of negligence of other armed forces personnel.

Plaintiff argues, however, that *Feres* is inapplicable here because the injury complained of was not sustained "incident to service." This contention is misplaced. Since *Feres* there have been numerous cases involving actions for injury to or death of a serviceman as the result of malpractice in a military hospital or other government medical facility. The courts have typically taken the position that the serviceman received government medical treatment solely because of his military status, and that accordingly injuries received therein must be deemed incident to service, for which government liability is precluded. In none of the cases has recovery been allowed. *See* Annot., 31

A.L.R. Fed. 146 (1977)[1] §22, at 208 et seq.; 35 Am.Jur.2d *Federal Tort Claims Act* §75 (1967).

In her Complaint, Plaintiff alleges that the malpractice occurred while Longenecker was on active duty with the Marine Corps. This distinguishes the instant case from *Brooks v. United States*,[2] *supra*, in which the plaintiff was on furlough when injured; and from *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954),[3] in which the plaintiff was injured by an army surgeon after his discharge from the service.

In view of the foregoing, Defendant's Motion to Dismiss based on the Court's lack of subject matter jurisdiction should be granted and Plaintiff's action should be dismissed.

It is so ordered this 6th day of February, 1978.

/S/ Fred Daugherty

United States District Judge

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[1] "Serviceman's Right to Recover Under Federal Tort Claims Act (28 USCS §§2671 et seq.)"

[2] In *Brooks*, suit under the Act was permitted by a serviceman on leave who was negligently injured on a public highway when the vehicle in which he was riding was struck by a government vehicle driven by a government employee.

[3] In *Brown*, a serviceman sustained a knee injury while on active duty and Veterans Administration doctors negligently operated on the knee seven years after his discharge. Suit was permitted under the Federal Tort Claims Act.